Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1851

JOSEPH S. HARRIS,
Petitioner,

v.

H. SCHULDT REEDERI,
Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE
UNITED STATES

No.

JOSEPH S. HARRIS,

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v.

H. SCHULDT REEDERI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS DELIVERED IN THE COURTS BELOW:

Petitioner Joseph Harris, a long-shoreman, suffered personal injuries as a result of an accident which occurred on December 18, 1975 while petitioner was employed by Southern Stevedoring

Corporation to engage in cargo loading operations aboard the defendant H. Schuldt Reederi's vessel MEXICAN TRADER. Petitioner was paid workmen's compensation benefits for those injuries pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq. In addition, petitioner brought the instant action against the defendant vessel owner for negligence, as permitted by 33 U.S.C. Section 905 and Section 933(a). The matter was tried in the United States District Court for the Eastern District of Virginia before the Honorable Richard B. Kellam, United States District Judge, with a jury, on April 5, April 6, and April 10, 1978. The jury returned a verdict in favor of the defendant vessel owner, and judgment was entered in favor of the defendant by Order dated April 10, 1978.

The matter was appealed by the

plaintiff to the United States Court of Appeals for the Fourth Circuit. The case was argued before a panel of the Fourth Circuit on February 8, 1979. In a Per Curiam Opinion dated March 8, 1979, the panel affirmed the judgment of the district court.

Plaintiff petitioned for rehearing and for reargument en banc. By order of the Fourth Circuit Court of Appeals filed April 13, 1979, the Petition for Rehearing was denied. All pertinent opinions are appended hereto.

JURISDICTION

The date of the Judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is March 8, 1979. The date of the denial by the Fourth Circuit of petitioner's Petition for a rehearing and reargument en banc is April 13, 1979. The

statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. In a longshoreman's negligence suit against a vessel owner, is the use of the Restatement of Torts (2d) Section 343A to define the vessel owner's standard of care limited only to cases where the vessel owner acts as its own stevedore?

II. In a longshoreman's negligence suit against a vessel owner, does the shipowner owe the longshoreman the duty of exercising reasonable care under the circumstances or is the shipowner's duty merely to treat the longshoreman as an invitee under land use principles as set forth in Section 343 and 343A of the Restatement of Torts (2d)?

STATUTORY PROVISIONS

33 U.S.C.S. Section 905:

> Sec. 5. (a) The liability of an employer prescribed in Section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise

entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services,

no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

33 U.S.C.S. Section 933(a):

If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

STATEMENT OF THE CASE

Joseph Harris is a longshoreman employed by Southern Stevedoring Corporation on December 18, 1975. Harris and the other members of his gang were loading hogsheads of tobacco aboard the vessel MEXICAN TRADER on that date while the vessel was docked at Norfolk, Virginia. The gang began work at 8:00 a.m. At shortly after 3:00 p.m., Joseph Harris suffered injuries to his hand in the loading of a draft of hogsheads.

In loading the tobacco, the longshoremen were using the ship's winch. The winch was being operated throughout the cargo operations by longshoremen, known as "operators" or "winchmen." There are two winchmen to a longshoring gang and they take turns operating the winch throughout the day. The winchman at the time of Harris' injury was Mr. Eure. The testimony of Mr. Eure was

that the particular winch in question had been working improperly on the day of the accident, that it had been drifting, that the brakes would not hold when the winch was put in neutral.

The accident occurred as a draft of tobacco was being lowered into the hold to be stowed. The normal procedure for the longshoremen in the hold is to approach the draft when it is a few feet off the deck and push it into its stowage place. The evidence at the trial was that the draft in question drifted suddenly as the longshoremen had put their hands on the sides of the hogsheads to push the draft into its stowage position. As a result of this sudden drift, Joe Harris' finger was smashed between the incoming draft and a previously stowed draft. As a result, Harris suffered severe injury to his right index finger which disabled him from work as a

longshoreman.

During the cargo operations, the mate of the vessel had been told by the longshoremen of the defective winch. The evidence to that effect came from Harris himself, from winch operator Eure, and from Mr. Hicks, another gang-member. The mate answered these complaints by saying that he would have the winch repaired but that meanwhile the longshoremen should continue working.

Jurisdiction in the court of first instance, the United States District Court for the Eastern District of Virginia, existed by virtue of Title 28 U.S.C.S. 1332 on the gounds of diversity of citizenship and the amount in controversy.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Court of Appeals has rendered a decision in conflict with the

decisions of other Courts of Appeals on the same matter.

The question of whether in a longshoreman's suit against a vessel owner the use of the Restatement of Torts (2d) Section 343A to define the vessel owner's standard of care is limited only to cases where the vessel owner acts as its own stevedore has been decided in the negative by both the Second Circuit and the Fifth Circuit. Both the Second Circuit and the Fifth Circuit have adopted the language of the Restatement of Torts (2d) Section 343A as a proper expression of the vessel owner's standard of care towards longshoremen engaged in cargo operations aboard the owner's vessels. Both the Second Circuit and the Fifth Circuit have applied this standard of care phrased in the language of Section 343A in cases where the vessel owner has hired a

stevedore contractor, an employer of longshoremen, to load or unload the vessel in question. The Fourth Circuit however has limited the application of the Section 343A Standard of Care to situations where the vessel owner employed the longshoremen directly, thus serving as his own stevedore. The anomalous result is that Section 343A of the Restatement is applied as the vessel owner's standard of care differently in different ports. This result is particularly inappropriate in view of the stated intention of Congress that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et seq., as amended in 1972, be applied uniformly throughout all jurisdictions. The House of Representatives committee report accompanying the 1972 Amendments states very clearly that ". . . [T]he Committee does not intend that the

negligence remedy authorized in the bill shall be applied differently in different ports . . .." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., (1972) U.S. Code Cong. & Admin. News 4698, 4705.

In the 1972 Amendments to the Longshoremen's Act Congress removed the vessel owner's liability to the longshoreman for unseaworthiness. However Congress did permit the longshoreman to maintain an action against the vessel owner based on negligence. 33 U.S.C. Section 905(b). Congress did not specify the standard of care by which vessel owner negligence was to be determined. The House Report does indicate however that Congress intended that land-based law be applied.

> "Under this standard, as adopted by the Committee, there will of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application

> of accepted principles of tort law and the ordinary process of litigation--just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." (1972) U.S. Code Cong. & Admin. News at 4703.

In applying the language of the Committee Report and fashioning the negligence remedy against vessel owners, several of the Courts of Appeals have looked to the Restatement of Torts (2d) as an indication of land-based non-maritime law. The vessel owner's standard of care has often been phrased in terms of the Restatement provisions applicable

to owners and occupiers of land, found in Chapter 13, "Liability for Condition and Use of Land." See Anuszewski v. Dynamic Mariners Corporation, 540 F2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977).

A review of the cases decided by the Second Circuit and Fifth Circuit points out the difference between the holding in those courts and the Fourth Circuit's rule. In Napoli v. [Trans-pacific Carriers Corp. and Universal Cargo Carriers, Inc.] Helenic Lines, Ltd., 536 F2d 505 (2d Cir. 1976) the Second Circuit decided that Section 343A of the Restatement was applicable to longshoremen's negligence suits against vessel owners. The court noted that Section 343A provides a modern exception to the common law rule that a possessor of land owed to invitees no duty to warn of open and obvious dangers.

Section 343A provides for liability despite the openness and obviousness of the danger where the possessor should anticipate harm to the invitee despite the openness of the danger. In Napoli the shipowner had acted as its own stevedore, employing longshoremen directly.

The Second Circuit has continued to utilize the standard of Section 343A in subsequent cases in which the shipowner was not acting as its own stevedore, but had instead contracted with an independent stevedoring company. In all of the following cases the Second Circuit used Section 343A as the standard of care, where the vessel had employed a stevedoring company: Lubrano v. Royal Netherlands Steamship Company, 572 F2d 364 (1978); Canizzo v. Farrell Lines, Inc., 579 F2d 682 (1978), cert. denied 99 S. Ct. 316; and Lopez v. A/S D/S Svendborg,

581 F2d 319 (1978).

The Fifth Circuit has also applied the Restatement as the vessel owner's standard of care, including the provisions of Sections 342, 343, and 343A. That Circuit has applied the rule of Section 343A in the situation where the vessel employed a stevedore company to perform loading or unloading operations. The Fifth Circuit has not limited the application of Section 343A to situations where the shipowner also acted as its own stevedore. See Gay v. Ocean Transport and Trading Ltd., 546 F2d 1233, (1977); Brown v. Mitsubishi Shintaku Ginko, 550 F2d 331, (1977); Samuels v. Empresa Lineas Maritimas Argentinas, 573 F2d 884 (1978).

However, the Fourth Circuit has differed from that view. The Fourth Circuit has recognized in general the applicability of the Restatement to

negligence suits brought against vessel owners. Anuszewski, supra. However, the Fourth Circuit has not recognized the applicability of Section 343A to such cases. Instead, the Fourth Circuit has held in Chavis v. Finnlines Ltd. O/Y, 576 F2d 1072 (1978), that Section 343A applies only where the shipowner is serving as its own stevedore, as in Napoli. In the Harris case, review of which is sought in this Petition, the Fourth Circuit refused, based upon Chavis, to order that Section 343A be included as an element of the shipowner's standard of care. This restrictive application of Section 343A only to cases where the shipowner was acting as its own stevedore creates a far different standard of care in the Fourth Circuit than is applicable in the Second Circuit and the Fifth Circuit. The rule in the Fourth Circuit does not apply the

modern rule of land use law embodied in Section 343A and imposes on the longshoreman the much harsher common law rule of landowner liability. This divergent interpretation of the Fourth Circuit should therefore be reviewed by this court by Writ of Certiorari.

In a longshoreman's negligence suit against the vessel owner, the shipowner owes the longshoreman the duty of exercising reasonable care under the circumstances. A shipowner's duty is not merely to treat the longshoreman as an invitee under land use principles as set forth in Section 343 and Section 343A of the Restatement (2d) of Torts. It has been well settled by the United States Supreme Court that "The owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of

exercising reasonable care under the circumstances of each case." Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). Longshoremen hired to load or unload the shipowner's vessel are, of course, on board the vessel in furtherance of the shipowner's legitimate interests. Such longshoremen would therefore be entitled to the protection afforded by the Kermarec standard. Shipowners must exercise "reasonable care under the circumstances of each case" to protect longshoremen from harm while they are aboard ship. Naturally, where a longshoreman is injured by a breach of that duty, he would have a remedy at law were the failure of the shipowner to exercise reasonable care, i.e. negligence.

This is the reasoning applied by the Ninth Circuit in the recent case of De Los Santos v. Scindia Steam Navigation

Company. Ltd., No. 76-3225 (decided May 1, 1979). The Ninth Circuit concluded that the vessel owner's standard of care should be responsive to five concerns: 1) Congress' desire to encourage safety. H.R. Rep. No. 92-1441, (1972) U.S. Code Cong. & Admin. News at 4699. 2) Congress' desire for uniformity. Id. at 4705. 3) Vessel owner liability should be based upon actual fault. Id. at 4702. 4) Comparative negligence of a longshoreman should be applied in mitigation of damages rather than contributory negligence being applied as a bar to any recovery. Id. at 4705. 5) Congress' desire to apply the admiralty rule precluding the defense of "assumption of risk." Id. Cf. Gallardo v. Westfall-Larsen and Co., 435 F.Supp. 484 (N.D. Cal. 1977).

The standard of care adopted by the Ninth Circuit in De Los Santos was:

> "A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such longshoremen, and (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoremen against the danger." (Slip Opinion at 9).

The Ninth Circuit specifically declined to follow the definition of negligence adopted in the Second, Fourth, and Fifth Circuits, which was framed in terms of a landowner's duty to invitees under Section 343 and Section 343A of the Restatement. Instead the Ninth Circuit concluded that both Restatement sections were based on the common law doctrines of contributory negligence and assumption of risk which had been explicitly rejected by Congress in the 1972 Amendments. Relying upon this court's decision

in Kermarec, the Ninth Circuit focused upon what was "reasonable care under the circumstances." The Ninth Circuit therefore reversed the district court judgment which had explicitly adopted the standard of negligence set forth in the Restatement of Torts (2d) Section 343 and 343A.

The Third Circuit Court of Appeals in Brown v. Ivarans Rederi A/S, 545 F2d 854 (3d Cir. 1976), has also noted the inappropriateness of Section 343A as the standard of care because that section is based on the doctrine of assumption of risk. See Comment (e) to Section 343A. The Third Circuit therefore did not find Section 343A persuasive as the shipowner's negligence standard. In accord, Hurst v. Triad Shipping Co., 554 F2d 1237, 1249-50 (3d Cir. 1977).

The district courts in both the Ninth Circuit and Third Circuit have

followed the respective Court of Appeals and declined to apply Section 343 and 343A. In the Ninth Circuit see Gallardo, supra., and Davis v. Inca Compania Naviera S.A., 440 F.Supp. 448 (W.D.Wash. 1977). In the Third Circuit see Blackburn v. Prudential Lines Inc., 454 F.Supp. 1302 (E.D. Pa. 1978) and Dougherty v. Haaland, 457 F.Supp. 860 (E.D. Pa. 1978).

District courts in the Second Circuit have also described the difficulties with applying Section 343 and Section 343A in vessel owner negligence suits. In Espinoza v. U.S. Lines, Inc., 444 F.Supp. 405 (S.D. N.Y. 1978), the court rejected the Restatement standard and applied the rule of reasonable care under the circumstances.

The one state supreme court which has decided the question has also rejected the application of Restatement

Sections 343 and 343A in vessel owner negligence suits. Shepler v. Weyerhauser Co., 569 P.2d 1040 (Ore. 1977), 1978 A.M.C. 1590, cert. denied, 434 U.S. 1051. The Oregon Supreme Court rejected those Restatement sections and instead imposed on the vessel owner the duty to exercise ordinary care to maintain a reasonably safe place for the longshoremen to work.

However, as previously noted, several of the courts of appeals have referred to the Restatement of Torts (2d) land use law as found in Chapter 13 of the Restatement as the land-based law by which vessel owner negligence is to be determined. In the Fourth Circuit see Anuszewski, supra. and Chavis, supra. In the Second Circuit see Napoli, supra; Lubrano, supra; Canizzo, supra; and Lopez, supra. In the Fifth Circuit see Gay, supra; Brown v. Mitsubishi, supra;

and Samuels, supra.

Thus, there is again a major split in the opinions of the courts of appeals. The Ninth Circuit and the Supreme Court of Oregon have adopted a standard which, like Kermarec, requires the shipowner to exercise reasonable care in the circumstances of each case. The Third Circuit has joined the Ninth Circuit and the Supreme Court of Oregon in rejecting the application of the land use principles of the Restatement found in Section 343 and 343A as the vessel owner standard of care. However, an opposite result obtained in the Second, Fourth, and Fifth Circuits.

The observation of Judge Friendly dissenting in Canizzo, supra, is noteworthy. The Judge wrote:

> "In retrospect it seems to have been a mistake for courts to give such talismanic significance to Sections 343 and 343A of the Restatement of Torts (2d)

> as has sometimes been done. These sections are awkwardly drafted; the framers had no notion that they would be applied to the tangled situations of ship loading or unloading; and they must be read together with Chapter 15, 'Liability of an Employer of an Independent Contractor.' In dealing with Section 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 Amendments." 579 F2d at 688.

This Court should therefore review the Fourth Circuit opinion in the instant matter in order to bring uniformity to this important area of maritime law.

(2) The Court of Appeals decision herein conflicts with the prior decision of this Court.

As pointed out above, this court long ago established a standard of care for vessel owners applicable to all persons legitimately aboard the vessel. The Kermarec rule requires such vessel owners to exercise reasonable care for all who are on board for purposes not

inimical to the shipowner's legitimate interests. In Kermarec this court specifically declined to impose a different standard of care upon the shipowner based upon the different status which existed at common law between licensees and invitees. As this court concluded, "For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality." 358 U.S. at 631.

The Kermarec reasoning applies just as fully today. De Los Santos, supra, (Slip Opinion at 12). Therefore, it is inconsistent to base the shipowner's duty to longshoremen on the principles of land use law contained in the Restatement Sections 343 and 343A. The legislative history of Section 905(b) never refers to the Restatement and never

uses real property tort law terms such as "invitee." Id. The Congressional directive to apply land-based law does not require a wholesale adoption of real property classes and concepts. Kermarec, 358 U.S. at 631-32; Espinoza, 444 F.Supp. at 413-14. Yet that is precisely what has occurred in the Fourth Circuit, as well as in the Second and the Fifth Circuit. Such a rule however is foreign to the "simple" and "practical" rule established by this court in Kermarec.

The Court of Appeals decisions which fail to adhere to the Kermarec rule should be reviewed by this Court through a grant of a Writ of Certiorari.

(3) The Court of Appeals has decided an important question of Federal Law which has not been but should be settled by this Court.

Congress, when it amended the

Longshoremen's Act in 1972, intended that legal questions arising under the negligence action should be determined as a matter of Federal Law. Congress also desired that the negligence remedy be applied uniformly in the various courts. Since the 1972 Amendments the lower federal courts have struggled to fashion the standard by which vessel owner negligence would be determined and to articulate the duty owed by vessel owners to longshoremen. As that question has proceeded through numerous district courts and through the courts of appeals of several circuits, it is clear that there have been several different descriptions of the vessel owner's duty and how breach of that duty will be determined. Some courts have applied the standard of reasonable care under the circumstances. De Los Santos, supra; Shepler, supra. Others,

including the Fourth Circuit in Harris, have applied the Restatement principles of land-use law. Still others have reached conclusions somewhere in between. Brown v. Ivarans Rederi, supra; Gallardo, supra; Espinoza, supra. The maritime industry is therefore in a state of uncertainty as to just what duty is owed by vessel owners to longshoremen. At the present time, the duty varies from port to port and perhaps depending on whether the negligence action is brought in state or federal court. That variation is precisely what Congress sought to avoid. It falls to this Court to bring about the uniformity in application of the negligence action which Congress desired.

This Court has acted previously to construe the 1972 Amendments to the Longshoremen's Act. In Northeast Marine Terminal Company, Inc. v. Caputo, 432 U.S. 249 (1977), this Court addressed

the question of the coverage of the amended Act. Thereafter, the question of who qualified as a longshoreman was largely settled. Similarly, this Court has granted certiorari and heard argument on Edmonds v. Compangnie Generale Transatlantique, No. 78-479 (Argued March 19, 1979). Edmonds presents this Court with the question of what damages can be recovered from the shipowner in a longshoreman's negligence action. Now, a third and perhaps final question is presented to the Court. Longshoremen, stevedore companies, and vessel owners must know the uniform duty which vessel owners owe to longshoremen aboard their vessels. This Court should provide guidance to the maritime industry on this important legal question. A uniform rule as to what duties the vessel owner owes and how breach of those duties is determined will enable

the interested parties to go on about the business of maritime commerce knowing how the law will require them to act. This important question of Federal law should be settled by this Court through a review of the Fourth Circuit's Opinion herein.

This Court has previously granted certiorari to Samuels, supra, which raises as one issue the standard of care applicable to vessel owners. The instant petition should also be granted however because the standard of care applied by the Fourth Circuit here differed from that applied by the Fifth Circuit in the Samuels case. If this Court has both Samuels and Harris before it for review, the Court will be able to comprehensively address the issue of the applicable vessel owner standard of care. A Writ of Certiorari should issue therefore to review the

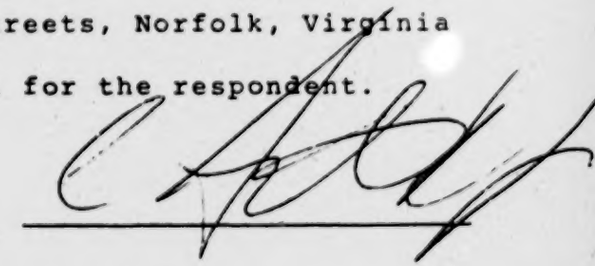
judgment and opinion of the Fourth Circuit herein.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals herein has adopted a standard of care for vessel owners far different from that adopted by the other Courts of Appeals which have considered the question. The Fourth Circuit's decision is also contrary to the prior decision of this Court. A writ of certiorari should issue to review the judgment of the Fourth Circuit Court of Appeals herein.

CERTIFICATE OF SERVICE

I, C. Arthur Rutter, Jr., certify that on or before the 12th day of June, 1979, I mailed, postage prepaid, 40 copies of this Petition for Certiorari to the Clerk, U.S. Supreme Court, and mailed 3 copies, postage prepaid, to Charles R. Dalton, Jr., Esquire, Seawell, McCoy, Dalton, Hughes, Gore & Timms, 936 Wainwright Bldg., Bute & Duke Streets, Norfolk, Virginia 23510, counsel for the respondent.



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COURT ORDER of the United States District Court for the Eastern District of Virginia, Norfolk Division dated April 10, 1978

This action came on for trial before the Court and a jury, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is entered in favor of the defendant.

By: W. Farley Powers, Jr.
Clerk of Court

Per Curiam Opinion of the United States Court of Appeals for the Fourth Circuit Dated March 8, 1979

In appealing from a judgment in favor of the shipowner in his action to recover for injuries allegedly sustained by him while working as a longshoreman by reason of the defendant shipowner's negligence, the plaintiff longshoreman assigns error in the failure of the district court, in its instructions on the jury, to submit his proposed instruction on the shipowner's duty to a longshoreman working on the latter's vessel. Since the requested instruction was concededly contrary to the rule as declared in Chavis v. Finnlines, Ltd., O/Y (4th Cir. 1978) 576 F. 2d 1072, and Riddle v. Exxon Transp. Co. (4th Cir. 1977) 563 F. 2d 1103, the district court did not err in

refusing the instruction.

The plaintiff has also challenged the district court's refusal to include in its jury charge a statement of the sums received by him for medical benefits and indemnity compensation benefits under the terms of the Longshoremen's and Harbor Workers' Compensation Act. In the context of a suit in which the longshoreman is the sole plaintiff, it was not error to refuse to so charge the jury. Cf., Riddle v. Exxon Transp. Co., supra.

The judgment of the district court is accordingly AFFIRMED.

Decided: March 8, 1979

Before Winter, Russell and Widener, Circuit Judges.

Court Order of the United States Court of Appeals for the Fourth Circuit dated April 13, 1979.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell for a panel consisting of Judge Winter, Judge Russell, and Judge Widener.

For the Court,

By: William K. Slate, Clerk

Supreme Court, U. S.
FILED
JUL 13 1979
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.: 78-1851

JOSEPH S. HARRIS

Petitioner,

v.

H. SCHULDT REEDEREI,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

**On Petition for writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit**

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is not yet officially reported, but it is made a part of the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are properly set forth in the Petition.

QUESTION PRESENTED

Disagreeing with petitioner's framing of the issues, respondent asserts that the sole controlling issue is:

> Where a longshoreman's injury was caused solely by stevedore's breach of its duty, is the standard of care owed by shipowner under the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act even a material issue?

STATUTORY PROVISIONS

33 U.S.C. Section 905:

> Sec. 5(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

29 C.F.R. Section 1918.2

Scope and responsibility.

(a) *The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in §1918.3(c).*

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

29 C.F.R. Section 1918.3

Definitions.

(a) The term "shall" indicates provisions which are mandatory.

(b) The term "Secretary" means the Secretary of Labor.

(c) *The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations* or related employments, as defined herein with the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term "employee" means any longshoreman, or other person engaged in longshoring operations or related employments, within the Federal maritime jurisdiction on the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

29 C.F.R. Section 1918.53

(c) *Electrical winches*

(1) *When the electro-magnetic or other service brake is unable to hold the load, the winch shall not be used.*

(2) Winches shall not be used when one or more control points, either hoisting or lowering, is not operating properly. Employees shall not be permitted to tamper with or adjust electric control circuits.

(3) When winches are left unattended, control levers shall be placed in the neutral position and, whenever possible, the power shall be shut off or control levers locked at the winch or the operating controls.

(emphasis added).

STATEMENT OF THE CASE

In December, 1975, the M/V MEXICAN TRADER called at Hampton Roads to load a partial cargo of tobacco. Prior to arrival in Port, the ship's Electrician inspected and operated all electrical winches to be used in loading cargo, and the ship's crew operated without problem these very same winches in raising the cargo booms for use by the stevedore.

On December 18, 1975, petitioner was working as a holdman in a gang of longshoremen headed by A. Magee. Southern Stevedoring Corporation, an expert stevedoring contractor, had been engaged by the shipowner to load hogsheads of tobacco in the Nos. #1, 3 and 4 holds of the vessel, and it assumed control of the entire loading operation aboard the vessel.

The Harris gang commenced loading hogsheads of tobacco with assistance of the ship's electrical winches in the lower #4 hold shortly after 8:00 a.m. Sometime after 3:00 p.m. the gang was "topping off" with hogsheads within the square of the coaming of the #4 hold at weather deck level having all but completed loading the forward end of both lower and 'tween deck areas.

At approximately 3:15 p.m. on that day, petitioner with assistance was manhandling a draft of three (3) hogsheads of tobacco being lowered by a "stand in" winch operator within the confined #4 coaming area when Harris' right index finger was caught between a hogshead and either the hatch coaming or adjacently stowed cargo.

Leaving the MEXICAN TRADER without assistance and proceeding to the stevedore's office, Harris reported his accident to stevedore timekeeper James Kensworthy, providing a version of this casualty reflecting simply cargo handling negligence on his part and that of his co-workers. The stevedore's accident report, signed by Harris, disclosed that Harris *then* stated, "While landing hogsheads tobacco into #4 forward, *draft swung around*, catching his right hand against the side of the hatch." No mention was made of drifting winches.

On the following day, the very same electrical winches, without repair or maintenance, were operated again by the stevedore's gang without complaint or problem.

According to the petitioner and two (2) fellow longshoremen, the burton winch at the forward end at #4 hold began to drift shortly after loading commenced on the morning of December 18th and continued to sporadically drift at irregular intervals thereafter throughout the day until Harris' accident. Interestingly, all three (3) of these witnesses, giving testimony of drifting winches were "stand-in" members of Magee's gang, and neither gang boss Magee nor regu-

lar winch operator Lamb were called as witnesses despite the fact that both of these longshoremen were under subpoena by the petitioner, present at Court, and were the witnesses best able to evaluate the performance of this winch.

Captain Carsten Voege, Supercargo aboard the MEXICAN TRADER, undisputably was on and about the deck of that vessel consulting with the stevedore foreman throughout this loading and he received no complaint regarding the winches either personally or through watch officers reporting to him. Testimony of complaints to a "Mate" regarding drifting winches and more particularly the physical characteristics of such "phantom" officer were conflicting and contested vigorously.

To cite an additional inconsistency in the drifting winch testimony, the longshoremen all recalled sporadic drifting of the burton winch, yet expert testimony by Captain William Wheeler, former President of Cargo Gear Survey and Certification Bureau, indicated that the mechanical characteristics of electric winches of the variety in use aboard the MEXICAN TRADER are such that if a winch begins to drift, then such drifting occurs with each load and becomes progressively worse with extended use.

It was further undisputed that the stevedore did not stop this loading operation at any stage although the purported malfunctioning of the winch lasted over a period in excess of six (6) hours.

Safety and Health Regulations for Longshoremen, 29 C.F.R. 1918.2(a) and 1918.53 place the *sole* responsibility upon the stevedore to cease its loading operation until such an unsafe condition is corrected. The *only* properly qualified stevedoring expert testifying confirmed that *good stevedoring practice* mandated that such operations cease in the face of drifting winches until such condition was corrected.

Furthermore, although not material to the issue herein, Harris' own testimony revealed a careless handling of this draft. All the testimony showed the Plaintiff approached this draft of three (3) hogsheads weighing approximately 3,000 pounds when it was still being lowered and before it had come to rest in a vertical position just off the deck. Expert testimony reflected that such a draft should never be approached or handled until it is at rest particularly when handled in a confined area as where petitioner was then working.

Petitioner's sole explanation for his accident was a sporadically drifting burton winch, yet this explanation was not supported by his own initial version of the casualty, nor the mechanical characteristics of the electric winches aboard the MEXICAN TRADER. More to the point, the stevedore undisputedly continued to operate the winches for over six (6) hours in the face of a Safety & Health Regulation (29 C.F.R. 1918.53) that required it to cease work until the allegedly unsafe condition was corrected.

This case was initially tried before the Honorable Richard B. Kellam and jury on April 5, April 6, and April 10, 1978. Following a verdict in favor of the shipowner, this trial jurist overruled a motion for a new trial.

Contrary to Rule 10A of the Rules of Practice for the Eastern District of Virginia, which require that jury charges be filed at least five (5) working days prior to trial, petitioner did not submit any proposed charge until the trial was well under way. He never requested orally or in writing, a charge properly reflective of his second issue herein, whether "a shipowner owes its longshoremen the duty of exercising reasonable care under the circumstances."

On appeal below, petitioner contested solely the trial court's refusal to charge on the principles enunciated by Section 343A of the Restatement (Second) of Torts. The case

came on for argument before Circuit Judges Winter, Russell and Widener who handed down a per curiam opinion affirming the jury verdict in favor of the shipowner. In so ruling, the Court below pertinently had *solely* this to say about the disputed omission from the charge:

> ". . . Since the requested instruction was concededly contrary to the rule as declared in *Chavis* v. *Finnlines, Ltd., O/Y* (4th Cir. 1978)576 F.2d 1072, and *Riddle* v. *Exxon Trans. Co.* (4th Cir. 1977) 563 F.2d 1103, the district court did not err in refusing the instruction."

The purport of the above comment of the Court of Appeals in affirming the district court's judgment raises the dispositive issue herein. Petitioner has misconstrued the meaning of this ruling, as well as the Fourth Circuit Court of Appeals' view of Section 343A of the Restatement by and through the thrust of his petition.

ARGUMENT

WHERE A LONGSHOREMAN'S INJURY WAS CAUSED SOLELY BY STEVEDORE'S BREACH OF ITS DUTY, THE STANDARD OF CARE OWED BY SHIPOWNER UNDER THE 1972 AMENDMENT TO THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT IS IMMATERIAL.

By the 1972 Amendments to the Longshoremen's & Harbor Worker's Compensation Act (33 U.S.C. 901, *et seq.)*, Congress eliminated the previously prevalent three-cornered law suits involving longshoremen, shipowners and stevedores which were founded primarily on the principle of unseaworthiness, indemnity and occasionally negligence. Under Section 905(b), the Act still allows a longshoreman to sue a shipowner for the latter's negligence, but eliminates the shipowner's all but absolute liability to a longshoreman injured on board its vessel based upon unseaworthiness. The

legislative history of the 1972 Amendments establishes that land-based principles of law shall apply to longshoremen claims founded on negligence. In an almost unbroken line of authority to date, lower courts have recognized this intent and have uniformly applied land-based principles.

Similarly, the lower Courts have consistently recognized that the stevedore has the primary responsibility for the protection and safety of the longshoremen working aboard a vessel. Safety and Health Regulations for Longshoring (29 C.F.R. 1918.2, et seq.), explicitly place responsibility for their implementation upon the stevedore. Discussing the subject of safety, the Senate Report pertaining to the 1972 Amendments specifically stated:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve *to strengthen the employer's incentive to provide a safe place to work."* S. Rep. no. 92-1125, 92d Cong., 2d Sess.-2 (1972). (Emphasis supplied).

Likewise, speaking as to the *effect* which a *stevedore's breach of it's duty* was to have on the negligence action against a shipowner under its 1972 Amendment, Congress declared:

> "[t]he purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'non-delegable duties,' or the like . . . [and] *a vessel shall not be liable* in damages for acts or omissions of stevedores or employees of stevedores subject to this Act [citations] *for the manner or method in which stevedores or employees of stevedores subject to this Act*

perform their work [citations] . . .". 3 U.S. Code Cong. and Admin. News pg. 4703 (1972) (emphasis added).

The Fourth Circuit in considering this case has correctly found that Harris' injuries were caused solely by the stevedore's breach of its duty for which the shipowner is not liable. Stated otherwise, the legal reasoning on which the decision below was grounded did not turn on the standard of care owed by the shipowner whether it correctly be founded on land-based principles of negligence or otherwise.

REASONS WRIT SHOULD NOT BE GRANTED BY THIS COURT

I. DECISION BELOW DID NOT TURN ON STANDARD OF CARE OWED LONGSHOREMAN BY SHIPOWNER.

The premise is erroneous that the Court below has limited the application of Section 343A of the Restatement simply to situations in which the vessel owner is performing its own stevedoring. More important, it is falacious reasoning that *Harris* was decided on such basis, or that the Court's ruling denotes the standard of care required of the shipowner in cases under the 1972 Amendments. To the contrary, the Court below in specifically recognizing the applicability of Section 343A as "a correct exposition of the law" has found the application of that standard inapplicable, or the failure to instruct thereon harmless error, in all three (3) of the cases with which it has been confronted with this issue to date.

As quoted above, the Court below affirmed the jury's verdict here solely because plaintiff's theory of the case was "concededly contrary to the *rule* as declared in *Chavis* v. *Finnlines, Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978), and *Riddle* v. *Exxon Trans. Co.*, 563 F.2d 1103 (4th Cir. 1977). . . ."

(emphasis added). To appreciate the basis of the court's ruling then a determination must be made as to the import of the *"rule"* of *Riddle* and *Chavis* and its applicability, if any, to the standard of care owed by a shipowner.

Initially, in *Riddle* v. *Exxon*, 563 F.2d 1103 (4 Cir. 1977) where a shipyard's failure to timely test and maintain the shipowner's vessel in a gas free state during repairs resulted in an explosion injury to its employee, the Court of Appeals pointedly recognized Section 343A as the "modern rule," but deemed it inapplicable and the trial Court's failure to charge thereon harmless error because the accident was due solely to the shipyard's negligence. Speaking in behalf of the Fourth Circuit, Judge Donald Russell observed:

> "[e]ven under the modern rule a vessel is *not liable* for 'open and obvious' dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel, *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility* for the safety of the longshoreman or shipyard worker." 563 F.2d at 1111-1112 (emphasis added).

Later, in the same opinion, Judge Russell proceeded to set forth the *"rule"* subsequently followed by the Court of Appeals in both *Chavis* and *Harris:*

> "But, whether the statement of the District Court in the challenged instruction was erroneous for not qualifying the vessel's immunity for 'open and obvious' dangers in line with the modern rule [i.e., §343A] is irrelevant in this case and its use by the District Court would, if erroneous, be at most harmless error. *This is so because plaintiff's injuries resulted solely from the negligence of the [shipyard] and its employees;* . . . And this is so, irrespective of whether the condition resulting in plaintiff's injuries was 'open and obvious' or not. Such has recently been the clear holding in four well-reasoned decisions. *Hurst* v. *Triad*

Shipping Co., (3rd Cir. 1977) 554 F.2d 1237; *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, (2nd Cir. 1977) 553 F.2d 837; *Gay* v. *Ocean Transport & Trading, Ltd.*, (5th Cir. 1977) 546 F.2d 1233; and *Teofilovich* v. *d'Amico Mediterranean/Pacific Line*, (C.D.Cal. 1976) 415 F.Supp. 732; 563 F.2d at 1112 (emphasis added).

Following shortly thereafter, *Chavis* v. *Finnlines, Ltd., O/Y*, 576 F.2d 1072 (4 Cir. 1978) involved a situation wherein a stevedore loaded wet and slippery logs aboard shipowner's vessel creating a dangerous condition which a mate allegedly failed to correct by supplying requested dunnage. There, District Judge Walter Hoffman, speaking on behalf of the Court of Appeals, again specifically noted that Section 343A of the Restatement set forth "a correct explanation of the law," but he concluded that the case was exempt from its application and further distinguishable from *Napoli* v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir. 1976 by the reasoning expressed hereinafter:

> While we feel that *Napoli, supra*, contains a correct exposition of law, we nevertheless are constrained to limit its applicability to its facts. In *Napoli*, there was no question the *shipowner*, which was acting as its own stevedore, *allowed the defect to be created before the longshoremen began work*. However, *under the facts of the present case, it appears that the stevedore created the alleged defect*; 576 F.2d at 1079 (emphasis added).

Thereafter, quoting verbatim the entire reasoning of the *Riddle* holding as set forth above, Judge Hoffman concluded, "We feel, in sum, that the proper *resolution* of *this issue* was well stated in *Riddle* . . ." (emphasis added).

Thus, from a careful analysis of *Riddle* and *Chavis*, it appears that the "rule" applied here and the controlling principle of law did *not* deal with the standard of care (i.e., Section 343A) required of the shipowner and the circumstances under which the standard would be applied, but rather a teaching that there can be no recovery by a longshoreman where his injuries were solely caused by the

stevedore's negligence. *Edmonds* v. *Campagnie Generale Transatlantique*, ____ U.S. ____ (1979). The comments of Judge Hoffman pertaining to *Napoli* and its limiting facts are therefore *dicta* at most and certainly not the *"rule"* as enunciated initially in *Riddle* and referred to by the court below in the *Harris* case.

There are like rulings from the Second, Third and Ninth Circuits which have correctly denied the application of Section 343A in those cases where the shipowner could justifiably rely upon the stevedore to fulfill its primary responsibility to the longshoreman by protecting him from the hazards which the stevedore is in the best position to rectify. *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237 (3rd Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837 (2nd Cir. 1977); and *Teofilovich* v. *d'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D. Cal. 1976).

Thus, it is clear that *Harris* did not turn on the standard of care owed this longshoreman by the shipowner. Therefore, the *sole* basis on which petitioner seeks his Writ is falacious and ill founded.

II. CONFLICT OF DECISIONS ASSERTED BY PETITIONER IS GROUNDLESS

Petitioner incorrectly asserts that the Court below has established a shipowner's standard of care for the protection of longshoremen which is different from that of other circuits. The Court below has correctly and consistently held that the Restatement (Second) of Torts, Sections 343 and 343A, can each apply in appropriate factual situations. *See, Riddle, supra,* and *Chavis, supra.* The law embodied in these sections and others within the Restatements has been held to be appropriate land-based law which can be applied to measure a shipowners' liability to longshoremen. *See, e.g., Anuszewski* v. *Dynamic Mariners Corporation*, 540 F.2d 757 (4th Cir. 1976), *cert. denied* 429 U.S. 1098 (1977).

As clarified in the preceding section, the rule of *Riddle, supra, followed* in this case, did not turn on the standard of care owed by the shipowner to the longshoreman here, but rather on the stevedore's breach of its duty to the longshoremen which undisputably caused his injury. Moreover, as *Chavis, supra,* is not the subject of this appeal, the comments of visiting District Judge Hoffman upon the factual limitations of the application of the *Napoli* doctrine whether the same be construed as *dicta* or holding, do not present a proper vehicle for the resolution of conflicting standards, if any, between the Circuits.

While petitioner ostensibly seeks a writ of certiorari on the bases of a supposed conflict between the Second, Fourth and Fifth Circuits as to the standard of care required of shipowner arrived at through the application of land-based principles of law, the principle thrust of his petition is directed to a recent and as yet unreported decision of the Ninth Circuit in *De Los Santos* v. *Scindia Steam Navigation Co., Ltd.*, Civil Action No. 76-3225 (9th Cir. decided May 1, 1979), which suggests that such standard of care previously applied by all the maritime Circuits is erroneous.

In *De Los Santos*, a longshoreman injury claim brought under the 1972 Amendments to LHWCA wherein the trial Court had granted summary judgment to the shipowner by applying land-based principles (i.e., the Restatements) to determine the standard of care owed therein, the Ninth Circuit reversed, concluding that the standard of care should not be founded on land-based principles, but rather maritime ones as enunciated by this Court in the earlier case of *Kermarec* v. *Compagnie Generale Transatlantic*, 358 U.S. 625 (1959). The use of *Kermarec*, however, as precedent is subject to close scrutiny and question in that it involved a passenger claim and not one of an employee of an expert stevedore charged with protecting its employee as is the case here. Furthermore, *Kermarec* was decided prior to the limiting provisions of the 1972 Amendments to LHWCA.

Although the reasons why *De Los Santos* does not provide a contestable conflict between any of the Circuits are numerous, the bases on which a purported conflict should be rejected insofar as pertinent herein are readily apparent:

1. *De Los Santos* remains within the breast of the Ninth Circuit as the shipowner has filed a petition for rehearing en banc which remains under consideration to date. Furthermore, the en banc hearing must consider the recent affirmation by this Court that the 1972 Amendments require the application of a land based and not a maritime standard of care on the part of shipowner, *Edmonds, supra.*
2. The Ninth Circuit decision in *De Los Santos* appears in direct conflict with its decision in *Wescott* v. *Impresas Armadoras, S.A.*, 564 F.2d 875 (9th Cir. 1977) and, therefore, makes both the import and scope of this recent decision unclear.
3. On appeal, *Harris* did not turn on the shipowner's standard of care as discussed heretofore so that the case *sub judice* and *De Los Santos* do not present true conflicting decisions of the Fourth and Ninth Circuits for review.
4. Petitioner did not assert in a proper and timely fashion the *De Los Santos* standard of care at the trial stage of this case so as to provide a properly appealable issue of the shipowner's standard of care before the Court below or this Court.

The conflict alleged by Petitioner is illusory and without merit, and therefore this case is not one that requires the exercise of this Court discretionary jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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